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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

FILE: EAC 99 092 52014

OFFICE: VERMONT SERVICE CENTER

DATE 6 - MAR 2002

IN RE: PETITIONER:
BENEFICIARY

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act,
8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is engaged in international trade between the United States and China. The petitioner seeks to employ the beneficiary in the United States as its president. The director determined that the petitioner had not established a qualifying relationship with a foreign entity and had not established that the beneficiary would be employed in either a managerial or an executive capacity.

On appeal, counsel for the petitioner asserts that the Service's decision was based on erroneous legal conclusions and failure to consider the evidence submitted.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

The petitioner was incorporated in 1993 in the State of Massachusetts as an S corporation with two shareholders and 4000 shares of authorized stock. In September of 1998 an individual identified as the president of the petitioner entered into an agreement with a foreign entity to sell 51,000 shares of the petitioner for \$200,000. The petition was filed in February of 1999 seeking visa classification for the beneficiary as its president.

The first issue in this case is whether the petitioner has provided sufficient evidence of a qualifying relationship between the foreign entity and the United States entity.

8 C.F.R. 214.2(l)(1)(ii)(G) states:

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

8 C.F.R. 214.2(l)(1)(ii)(I) states:

Parent means a firm, corporation, or other legal entity which has subsidiaries.

8 C.F.R. 214.2(l)(1)(ii)(J) states:

Branch means an operation division or office of the same organization housed in a different location.

8 C.F.R. 214.2(l)(1)(ii)(K) states:

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

8 C.F.R. 214.2(l)(1)(ii)(L) states, in pertinent part:

Affiliate means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

In the petition, the petitioner stated that Guilin Seven Star Hotel Co., Ltd., (Guilin) a Chinese company, owned 51 percent of its stock and two individuals owned the remaining 49 percent of its stock. The petitioner submitted a stock certificate dated January 4, 1999 that showed issuance of 51,000 shares by an unknown entity to Guilin. A letter accompanying the petition from an individual identified as the vice president of the petitioner stated that, "[t]here are 100,000 shares of BNY stocks, of which 51% is owned by Guilin Seven Star Hotel Co., Ltd. . . ." The petitioner also submitted its Articles of Amendment changing its name to the current name and showing that there were 4000 shares of outstanding stock. The petitioner also provided a copy of its 1996 and 1997 Internal Revenue Service (IRS) Form 1120S.

On April 10, 1999 the director sent a notice of intent to deny to the petitioner stating that the evidence submitted did not clearly establish a qualifying relationship between the petitioner and a foreign entity. The director also indicated that the petitioner could submit evidence to overcome the notice of intent to deny. The director specifically requested evidence that would show the claimed qualifying relationship between the petitioner and a foreign entity and documentary evidence of the foreign entity's initial investment of \$200,000 in the petitioner.

In response to the notice of intent to deny, the petitioner submitted its minutes of the shareholders and directors in lieu of meeting dated May 1, 1999. The minutes revealed that the petitioner adopted a resolution to increase the number of authorized shares of its common stock from 4,000 to 100,000 shares at no par value. The petitioner also submitted its minutes of the shareholders and directors in lieu of meeting dated May 4, 1999 that indicated 51,000 shares had been sold to the foreign entity. The petitioner further submitted a stock certificate dated May 5, 1999 wherein the petitioner issued 51,000 shares to the foreign entity. The petitioner finally submitted a copy of an advice of credit addressed to the petitioner, advising of a money transfer of \$100,000 to its account 773-99300. The originator of the transfer was noted as Guilin, the foreign entity in this case. The advice of transfer was dated April 27, 1999. The petitioner also submitted its bank statements for the months of January, February and March of 1999. The January and February statement indicated a balance of approximately \$25,000. The March statement indicated a balance of \$112,874 showing a deposit of \$100,000 to the account.

The director determined that at the time of filing the petition the transfer of shares to the foreign entity was not legally valid and thus the petitioner had not established a qualifying relationship with a foreign entity. The director also noted that

the petitioner as an S corporation could not have a corporation or non-resident aliens as shareholders.

On appeal, counsel for the petitioner asserts that the petitioner has corrected the erroneously executed transfer of shares and has filed a certificate of correction with the Massachusetts state secretary. Counsel also asserts that the certificate of correction is effective as of the date the original document was filed, in this case the original document being the Articles of Incorporation that authorized 4000 shares. Counsel further asserts that there is no affirmative duty for the petitioner as an S corporation to cancel its S status. Counsel asserts that the loss of S status takes place automatically, by operation of law, when a corporation loses one of the characteristics required for the status, in this case selling shares to a foreign corporation.

Counsel's assertion that the loss of S status by a corporation takes place by operation of law is persuasive. The petitioner can no longer identify itself as an S corporation to the IRS. However, counsel's assertion that the petitioner has corrected its erroneous transfer of shares and that this retroactive correction is sufficient to establish a qualifying relationship as of the date of filing the petition is not persuasive. Regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and a foreign entity for purposes of this nonimmigrant visa classification. Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); see also Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982); Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988) (in immigrant proceedings). In addition 8 C.F.R. 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." Though the petitioner has now corrected the erroneous issuance of unauthorized stock, the fact remains that for immigration purposes, at the time the petitioner filed the petition, no qualifying relationship existed between the petitioner and the foreign entity. The foreign entity did not own authorized shares of the petitioner at the time the petition was filed. Further, the petitioner has not provided sufficient evidence that the foreign entity has fully paid for the stock it attempted to purchase. The petitioner has shown one bank statement with a deposit of \$100,000 and a credit advise that \$100,000 was transferred by the foreign entity to the petitioner. However, the agreement selling shares to the foreign entity indicates that the purchase price for the stock issued is \$200,000.

On review of the record, the petitioner has not provided evidence that a qualifying relationship existed between the petitioner and the foreign entity at the time the petition was filed.

The second issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial, executive or specialized knowledge capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction

from higher level executives, the board of directors, or stockholders of the organization.

Section 214(c)(2)(B) of the Act, 8 U.S.C. 1184(c)(2)(B), provides:

An alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

In the petition, the petitioner described the beneficiary's duties as having general charge and supervision of the business of the corporation. The petitioner further stated that the beneficiary would reorganize its international trade and marketing division and install or transfer U.S. technology into the Chinese market. The petitioner indicated that the beneficiary would manage a staff of 10 to 15 employees including 4 managers/supervisors and have full authority to approve purchases up to \$1 million; operate the international trade, marketing development division, technology development and other executive/managerial duties such as human resources department. The petitioner also noted that the beneficiary had outstanding expertise with the service, process and decision making structure particular to its firm and that his knowledge was narrowly held within the organization. The petitioner also included its business and recruitment plan that specified the company would employ four to six individuals within six months and possibly more in 1999.

The director requested that the petitioner submit additional evidence on this issue including a comprehensive description of the beneficiary's proposed duties, a complete position description for the petitioner's employees including a breakdown of the number of hours devoted to each employee's job duties.

In reply, the petitioner submitted a statement of the beneficiary's duties dated April 23, 1999. The statement noted the beneficiary's major responsibility was to carry out the petitioner's business plan. The statement also indicated that the beneficiary had located and purchased an office building and was attempting to purchase land to develop a restaurant and motel business. The statement next noted the beneficiary's plan to interview and hire managers for four departments once his L-1 status was approved and indicated that once managers for the departments were hired, the beneficiary would devote his time to the overall responsibility of developing the company. The petitioner also submitted a brief description of the duties of the vice president, the natural health department director, the director of wholesale/international trading/marketing and the director of real estate development.

The director determined that the petitioner had not established

that the beneficiary would be employed in either a managerial or executive capacity. The director based his decision on the lack of information regarding individuals who were currently employed by the petitioner and concluded that the beneficiary would necessarily be engaged in the non-managerial day-to-day operations of the company.

On appeal, counsel asserts that the Service decision ignores that the petitioner is a relatively new company and should not be compared to an established business. Counsel for the petitioner also contends that the evidence provided by the petitioner is sufficient to establish that the beneficiary will be acting in a managerial capacity. Counsel also provides a description of employee positions with an hourly breakdown of the position duties.

Counsels' assertion that the petitioner should not be treated as an established business is not persuasive. The petitioner is not considered a new office as the term is defined in the regulations. 8 C.F.R. 214.2(l)(1)(ii) states in pertinent part that:

(F) New office means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

The petitioner has been conducting business since its incorporation as an S corporation in 1993. The standards applicable to a new office thus do not apply.

Counsel's contention that the beneficiary will be acting in a managerial capacity is also unpersuasive. The petitioner's description of the beneficiary's job duties is not sufficient to warrant a finding the beneficiary will be acting in a managerial or executive capacity. The description of job duties is vague and general in nature, essentially serving to paraphrase the elements of the statutory definition of managerial and executive capacity. No concrete description is provided to explain what the beneficiary will do in the day-to-day execution of his position. The examples provided by the petitioner of the beneficiary purchasing an office building and making plans to purchase additional land are not duties that are essentially managerial or executive in nature. The beneficiary is simply providing services to the petitioner in order to expand its business. As noted by the director, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988).

Further the petitioner has not provided information on its employees. Currently the record contains no supporting documentary evidence that the petitioner employs individuals other

than the beneficiary and a vice-president. Instead, the petitioner notes through counsel, that it is waiting until the beneficiary's L-1 classification is approved before hiring other individuals. Counsel's submission of a position description for each potential employee with an hourly breakdown of duties is not helpful in this regard. First, where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. Matter of Soriano, 19 I&N Dec. 764 (BIA 1988). Second, as noted above the petitioner has not yet hired individuals for the beneficiary to manage and thus necessarily the beneficiary will be performing non-qualifying duties.

On review, the record does not support a finding that the beneficiary's duties are duties of one who functions or will function at a senior level within an organizational hierarchy other than in position title.

Regarding the initial contention that the beneficiary also held specialized knowledge regarding the petitioner, the petitioner has not provided any evidence that the beneficiary's knowledge is any different than the knowledge held by any individual attempting to expand his business in the United States. As the petitioner has not pursued this issue on appeal, the issue will not be examined further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.